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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 13th February 2018

+ **RFA 137/2017**

VIDYA SAGAR Appellant

Through: Mr. J. S. Kanwar, Advocate.
(M:9899770803)

versus

SUBHASH GUPTA Respondent

Through: Mr. Gireish Kandpal, Mr. Ghanshyam
Joshi and Mr. Chirag Joshi,
Advocates. (M:9810041237)

CORAM:
JUSTICE PRATHIBA M. SINGH

PRATHIBA M. SINGH, J (Oral)

CM APPL. 4708/2017 (delay in filing)

1. This is an application for condonation of delay of 25 days in filing the appeal. For the reasons stated in the application, same is allowed and the delay in filing is condoned. CM is accordingly disposed of.

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2. This is an appeal challenging the impugned judgment and decree dated 22nd September, 2016 by which the suit for possession filed by the Appellant/Plaintiff (*hereinafter 'Plaintiff'*) has been dismissed by the Trial Court. The dismissal has been primarily on the ground that as the Plaintiff failed to lead any evidence in the matter, it could not prove its case.

3. A perusal of the order sheets of the Trial Court proceedings reveals that the Plaintiff was present sometimes in person and sometimes through proxy counsel. The suit was filed on 13th March, 2013 and issues were framed in the matter on 17th September, 2015. After framing of the issues,

Plaintiff did not lead any evidence though he was present in person on 12th January, 2016 and 4th May, 2016. Since the earlier counsel was not appearing, Plaintiff engaged another counsel on 22nd September, 2016 who was present on the said date. However, the Trial Court noticed that despite adjournments no evidence was led by the Plaintiff and hence Plaintiff's evidence was closed.

4. In view of the fact that the Plaintiff's evidence was closed, learned counsel for Respondent/Defendant (*hereinafter, 'Defendant'*) made a statement that he is not interested in leading any evidence in the matter and accordingly, the Trial Court, on the same date, proceeded to pass judgment on the issues that were framed.

5. A perusal of the discussion on the issues in the impugned order reveals that the Trial Court has held that the burden to prove the issues was on the Plaintiff and since no evidence was led, issues were decided against the Plaintiff.

6. Arguments heard on behalf of both the parties.

7. A perusal of the order sheets of the Trial Court proceedings reveals that the Plaintiff has been present in person on several dates but has been negligent in leading the evidence in the matter. The Trial Court, being left with no option, had closed the evidence of the Plaintiff and proceeded to dismiss the suit. In a suit for possession and injunction, substantive rights of the Plaintiff have been affected by the dismissal of the suit. Parties are brothers. Defendant also pleaded that a partition had taken place between the parties. However, since the Plaintiff had failed to lead any evidence, the issues could not be adjudicated on merits.

8. In the circumstances of this case, Plaintiff can be put to terms and

afforded an opportunity to prove his case. The impugned judgment and decree is accordingly set aside. The Plaintiff is permitted to lead evidence, subject to payment of Rs.25,000/- as costs to the Defendant. Since the Plaintiff has been negligent in the past, the case is fixed on a time schedule in order to ensure that the adjudication of the suit is not delayed by the Plaintiff.

9. Accordingly, the following time schedule is fixed for the further proceedings:

- Plaintiff shall file his affidavit by way of evidence before 15th March 2018.
- The cross examination of Plaintiff's witness shall be concluded by 20th April 2018.
- Defendant shall file his evidence by 15th May, 2018.
- The cross examination of Defendant's witness shall be concluded within four weeks thereafter.
- Matter shall be expeditiously disposed of, in any event, not later than 31st July 2018.

10. Suit is restored to its original number and position. Costs shall be paid by Plaintiff to learned counsel for Defendant on the next date of hearing before the Trial Court.

11. List before the Trial Court on 26th February, 2018 for further directions.

12. Appeal is allowed in the above terms.

PRATHIBA M. SINGH
Judge

FEBRUARY 13, 2018/dk